STATE OF MICHIGAN

COURT OF APPEALS

TINA LUPI SMITH, Successor Personal Representative of the ESTATE OF BARBARA LUPI,

Plaintiff-Appellee,

v

TRINITY HEALTH-MICHIGAN, d/b/a ST. JOSEPH MERCY HOSPITAL,

Defendant-Appellant,

and

THOMAS O'KEEFE, M.D.,

Defendant.

UNPUBLISHED
July 24, 2008

No. 266635
Washtenaw Circuit Court
LC Nos. 02-000013-NM;
05-000143-NH

ON REMAND

TINA LUPI SMITH, Successor Personal Representative of the ESTATE OF BARBARA LUPI,

Plaintiff-Appellee,

v

TRINITY HEALTH-MICHIGAN, d/b/a ST. JOSEPH MERCY HOSPITAL,

Defendant-Appellant,

and

TIMOTHY SHINN, M.D., and MICHIGAN HEART, P.C.,

Defendants.

No. 266636
Washtenaw Circuit Court
LC No. 05-000143-NH;
02-000013-NM

Before: Donofrio, P.J., and O'Connell and Servitto, JJ.

PER CURIAM.

In these consolidated medical malpractice cases, we previously affirmed the trial court's denial of defendant's motions for summary disposition.[1] The Supreme Court held the application for leave in abeyance pending the decision in *Braverman v Garden City Hospital*, 480 Mich 1159; 746 NW2d 612 (2008). After *Braverman* was issued, in lieu of granting leave to appeal, the Supreme Court remanded to us for consideration of the other issues raised in Trinity's original application for leave to this Court. *Smith v Trinity Health-Michigan*, 481 Mich 874; 748 NW2d 817 (2008). After considering these issues, we again affirm.

In its application for leave, Trinity asserted that the affidavit of merit signed by orthopedic surgeon Edwin H. Season, III, M.D., was insufficient to support the claim of nursing malpractice alleged in the original 2002 complaint because Season did not meet the requirements for an expert witness, set forth in MCL 600.2912d, against the nurses because he did not specialize in nursing and had not devoted a majority of his time to the clinical practice of nursing or teaching nursing. Trinity argued that since the affidavit was deficient, it did not toll the running of the statute of limitations in the 2002 complaint.

Even assuming that the deficient affidavit of merit failed to toll the statute of limitations of the original complaint,[2] we concluded in our previous opinion that under the wrongful death saving statute, the limitations period began to run anew upon issuance of letters of authority to the successor personal representative and that the successor personal representative could initiate a new action and did not have to substitute into the action commenced by the original personal representative.[3] Based on this conclusion, it is irrelevant whether the limitations period in the action filed by the original personal representative was tolled, making the adequacy of the original affidavit irrelevant. Moreover, the 2005 complaint was accompanied with an affidavit

---

[1] *Smith v Trinity Health-Michigan*, unpublished opinion per curiam of the Court of Appeals, issued July 18, 2006 (Docket Nos. 266635, 266636, 266701).

[2] We note that if there were no 2005 complaint, under *Kirkaldy v Rim*, 478 Mich 581, 585-586; 734 NW2d 201 (2007), even with Season's deficient affidavit, the 2002 complaint still tolled the statute of limitations until the affidavit was successfully challenged. Because this would be the first successful challenge, and the initial personal representative filed the action within two years of the death of plaintiff's decedent, the initial limitations period was tolled until now, and plaintiff would have whatever time remains in the limitations period to refile a complaint with a conforming affidavit. *Id.* at 586.

[3] We note that in *Braverman*, the Supreme Court did not address the issues initially decided by this panel, but instead adopted the special panel opinion of this Court in *Braverman v Garden City Hosp*, 275 Mich App 705; 740 NW2d 744 (2007), wherein this Court held that a successor personal representative could rely on a notice of intent sent by a predecessor personal representative. By denying leave to appeal as to the other issues in this case, the Supreme Court did not disturb any of this Court's rulings in our previous opinion.

of merit from a registered nurse. To the extent that the 2005 complaint survives on its own merits, the 2002 affidavit is similarly irrelevant.

Trinity also argued in its application for leave that, under MCR 2.116(C)(6), it was entitled to summary disposition based on the concept of plea in abatement because "[a]nother action ha[d] been initiated between the same parties involving the same claim" given that the successor personal representative and the initial personal representative were in privity with one another.

When looking at pleas in abatement, the proper focus is on the timing of the motion and not on the timing of the filing of the second complaint. *Fast Air, Inc v Knight*, 235 Mich App 541, 545; 599 NW2d 489 (1999). In *Fast Air, Inc*, this Court held that:

> While we acknowledge that at the time of the filing of this suit, there was another case initiated and pending, we find that the purpose of CR 2.116(C)(6) is not served by dismissal of the Oakland case under the circumstances presented. The maintenance of this action does not result in "litigious harassment" or needless and duplicative expenditures because, at the time of dismissal, there was no action initiated and pending involving the same parties and same claims. In the Genesee action, plaintiffs were never, because of Knights failure to serve them, called on to defend any claims and were never entitled to pursue their claims as counterclaims. If we were to hold that MCR 2.116(C)(6) operates where other litigation was initiated but later dismissed, an absurd result, which ignores the purpose of the rule, is reached. For example, defendant Knight could have purposefully withheld service in order to prevent plaintiffs from asserting counterclaims in the Genesee action, while at the same time arguing that the Oakland action cannot proceed because of the Genesee action. This is not the purpose of the rule, and, in fact, is inconsistent with substantial justice. [*Id.* at 546-547.]

In the present litigation, the trial court had consolidated the two lawsuits. "Consolidation is permitted 'as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.'" *Bergeron v Busch*, 228 Mich App 618, 623; 579 NW2d 124 (1998), quoting *Johnson v Manhatten R Co*, 289 US 479, 496-497; 53 S Ct 721; 77 L Ed 1331 (1933). Therefore, the first action was technically still pending at the time Trinity filed its motion.

However, based on the analysis of abatement in *Fast Air, Inc*, we conclude that dismissal in this case would not serve the purpose of MCR 2.116(C)(6). The second lawsuit was not launched by an excessively litigious plaintiff whose goal was to harass defendant, and plaintiff was not "endlessly litigating matters involving the same questions and claims." *Fast Air, Inc*, *supra* at 546 (citations omitted). Moreover, while a consolidation does not technically extinguish a case, the apparent purpose of the consolidation in this case was to treat the two cases as one. Accordingly, the specific circumstances of this case further support our conclusion that abatement was not warranted.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto